

**Local No. 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers of America, AFL-CIO (Phillips Getschow Co.) and Robert W. Little.** Case 25-CB-7322

March 31, 1995

**ORDER REMANDING PROCEEDING TO  
ADMINISTRATIVE LAW JUDGE**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

On September 13, 1994, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision, in which, *inter alia*, he confirmed his ruling at the hearing that the Respondent's motion to dismiss the complaint should be granted. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief answering the General Counsel's exceptions. This Order, which remands the proceeding to the judge, pertains only to the procedural issues raised by the General Counsel's exceptions and the parties' briefs.

The complaint alleges that the Respondent violated Section 8(b)(1)(A) and (2) of the Act in the operation of its hiring hall by failing to refer individuals who had complied with the established rules and procedures for referral while referring individuals who had not. On August 26, 1994, at the close of the hearing, the Respondent moved orally to dismiss the complaint in its entirety for lack of evidence in support of the allegations. The judge permitted the General Counsel to make a brief oral response, and then, granting the motion, he dismissed the complaint from the bench. The General Counsel requested, in effect, to file a posthearing brief, and the judge rejected the request. On September 13, 1994, the judge issued the written decision referred to above, which substantiates his oral dismissal of the complaint on the basis of his finding that the General Counsel failed to establish a *prima facie* case.

In his exceptions, the General Counsel asserts that the judge's oral dismissal of the complaint and his written decision do not conform with Sections 102.42 and 102.45 of the Board's Rules and Regulations concerning, respectively, the filing of posthearing briefs and required contents of judges' decisions. The General Counsel also contends that the judge erred by failing to allow him sufficient time to review subpoenaed records, by rejecting his motion to amend the complaint, by rejecting evidence proffered by the General Counsel, and by admitting purported hearsay evidence proffered by the Respondent. The General Counsel requests a new trial before a different judge because of the assertedly prejudicial nature of the judge's conduct set forth above.

In opposing the General Counsel's exceptions, the Respondent contends, *inter alia*, that both the exceptions and the General Counsel's brief should be stricken for failure to conform with Section 102.46 of the Rules and Regulations, and that the General Counsel failed to comply with Section 102.27 following the judge's grant of the Respondent's motion to dismiss the complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Based on our careful review of the record and evaluation of the relevant circumstances, we find that the judge erred in failing to give the General Counsel an adequate opportunity to file a posthearing brief under Section 102.42,<sup>1</sup> opposing the Respondent's motion to dismiss the complaint and arguing the General Counsel's position regarding the merits of the case.<sup>2</sup> As Section 102.42 provided at all times relevant to this case,<sup>3</sup> the filing of briefs was a matter of right. Accordingly, we shall remand this proceeding to the judge who shall afford the parties a reasonable time within which to file posthearing briefs.<sup>4</sup> Thereafter, the judge shall issue an appropriate decision as ordered below.<sup>5</sup>

It is ordered that this proceeding be remanded to Administrative Law Judge Richard H. Beddow Jr. for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth the resolutions of all credibility issues, findings of fact, conclusions of law, and a recommended order, in accordance with this order of remand. Fol-

<sup>1</sup> See *Plumbers Local 195 (Stone & Webster Engineering)*, 237 NLRB 931 (1978); *Plastic Film Products Corp.*, 232 NLRB 722 (1977).

<sup>2</sup> In *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993), cited by Judge Beddow in his decision, it is apparent that the General Counsel filed written responses to the respondents' motions for dismissal of the complaint, thereby allowing the General Counsel a sufficient opportunity to argue the merits of his case before the judge.

<sup>3</sup> Cf., the Board's experimental modification of Sec. 102.35(j), Sec. 102.42, and Sec. 102.45(a) of the Rules and Regulations, effective Feb. 1, 1995. See 59 Fed. Reg. 65942 (1994).

<sup>4</sup> On our examination of the entire record, we are satisfied that the General Counsel's assertions concerning the judge's bias and prejudice are without merit. Therefore, the General Counsel's request for a new trial before a different judge is denied. The Respondent's motion to strike the General Counsel's exceptions and brief is also denied because, although they do not conform exactly to the requirements of Sec. 102.46, they are not so deficient as to warrant striking. Finally, we find no merit in the Respondent's contention that the General Counsel did not comply with Sec. 102.27. Whether the General Counsel's papers filed with the Board are treated as a request for review under Sec. 102.27 or as exceptions and brief under Sec. 102.46, they were timely filed in relation to the issuance of the judge's Sept. 13, 1994 decision.

<sup>5</sup> Nothing herein should be construed as a comment on the merits of the case, including the judge's other procedural rulings or the merits of the Respondent's Aug. 26, 1994 motion to dismiss the complaint.

lowing service of the supplemental decision on the parties, the appropriate provisions of the Board's Rules and Regulations shall be applicable.

*Walter Steele, Esq.*, for the General Counsel.

*Michael J. Stapp, Esq.*, of Kansas City, Kansas, for the Respondent.

## DECISION AND ORDER DISMISSING COMPLAINT

### STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Evansville, Indiana, on August 25 and 26, 1994. The proceeding is based on a charge filed June 16, 1993, and the Regional Director's complaint dated July 30, 1993, which alleges that the Respondent Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, "Beginning on or about April 14, 1993," by failing to refer certain individuals registered in its Evansville, Indiana area hiring hall or otherwise acting in accordance with established rules.

During the course of the hearing the General Counsel sought to amend the complaint to allege that the violations began on April 1 in lieu of April 14. The Respondent objected and the amendment was not allowed.

The General Counsel rested his case at approximately 4:30 p.m. on August 25, and the Respondent presented its evidence the next day. Following the presentation of several rebuttal witnesses by the General Counsel the parties were asked if there were any closing matters and the Respondent made a motion that the matter be dismissed. The General Counsel was given the opportunity to respond and, on due deliberation, Respondent's motion was granted and it was orally announced that the complaint was dismissed.

In a case of this nature the General Counsel is required to show that the union violated its duty of fair representation with regard to workers registered under its joint referral (hiring hall) rules, see *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353 (D.C. Cir. 1988), a case involving this same local union and cited to the parties, which upheld the Board's Decision in *Boilermakers Local 374 (Combustion Engineering)*, 284 NLRB 1382 (1987).

The record here shows that the alleged discriminatees had less than the 6000 hours' qualifying experience required to be on the applicable joint referral rules "A" and "B" list, that they were on the "C" list and called on April 14, and were referred on April 15 to work at the Phillips Getschow Co. jobsite. Inasmuch as no arbitrary or discriminatory action is shown on or after the dates alleged in the complaint there is no evidence to support the allegations of the complaint.

The General Counsel was allowed to inquire about events occurring between April 1 and 14 and nothing in this examination or in the record as a whole establishes anything that would show that the Union's joint referral rules are improper

or that the Union applied these rules improperly or in an arbitrary or discriminatory manner, or that the workers were not adequately informed of the relevant rules. Accordingly, I find that even if events which occurred prior to the critical date in the complaint were considered as more than background evidence, they would not support the allegations of the complaint.

In this connection it is noted that highly credible testimony was given by a union International representative (who had been assigned as Trustee of Local 374), which showed that he had administered the rules properly, as well by the two top officials (for the Union and for the employers' association), of the applicable joint rules and standards committee who were highly knowledgeable concerning the history and propriety of the referral rules established in the collective-bargaining agreement.

In contrast, the General Counsel's witnesses offered little more than speculation about their observations or feelings and provided no substantial evidence that could support a finding that there was a violation of the Act.

The General Counsel was advised that I had planned to request him to review the transcript and overall record with a view towards requesting dismissal of the complaint, and that in view of Respondent's motion I believed a dismissal of the complaint in response to that motion would be consistent with the purposes of the Act, with the applicable law and with the appropriate utilization of the resources of the Board and of the parties.

Accordingly, I hereby document my ruling at the hearing and I conclude that the General Counsel has failed to demonstrate a prima facie case with respect to the entire complaint and I confirm my ruling that the Respondent's motion should be granted and the complaint be dismissed. Compare the procedures in *Goodyear Tire & Rubber*, 312 NLRB 674 (1993).

### CONCLUSION OF LAW

The Respondent is not shown to have violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

### ORDER

The Respondent's motion is granted and the complaint is dismissed in its entirety.<sup>2</sup>

<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>2</sup> A request for review of this Order may be filed pursuant to Sec. 102.27 of the Board's Rules and Regulations.